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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 761

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

REPLY BRIEF

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Respondent in its brief nowhere even purports to meet the basic issue raised by this case—namely, whether the plaintiff in this case is entitled to a trial by jury of the statute of limitations where that defense turns solely upon whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act. Instead, it contends that petitioner's amenability to suit under the Clayton Act is completely irrelevant, and asserts that even if petitioner had been subject to suit in California under the antitrust laws during the relevant three-year period, the statute of limitations might still have been tolled. (Respondent's brief, pages 9-12.) To that contention we reply briefly.

At the very outset, we note that the court below, in holding that respondent was entitled to a jury trial, did not do so on the basis urged by respondent here. To the contrary, the Court below explicitly held that with respect to the California statute of limitations, the decision "depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue . . . ." (248 F. 2d 833, 835

Appendix to Petition, p. 4a.) In this respect, the decision of the Court below is clearly supported by the overwhelming weight of authority. See *Steiner* v. *20th Century-Fox Film Corporation*, 232 F. 2d 190 (9th Cir., 1956); *Klein* v. *Lionel Corporation*, 130 F. Supp. 725 (D. Del. 1955); *Winkler-Koch Engineering Co.* v. *Universal Oil Prod. Co.*, 100 F. Supp. 15 (S. D. N. Y., 1951); *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364 (S. D. N. Y., 1939); *Seaboard Terminals Corporation* v. *Standard Oil Co.*, 24 F. Supp. 1018 (S. D. N. Y., 1938).

Moreover, on its face, respondent's theory is manifestly untenable. It would be a complete paradox to hold that a defendant has been amenable to suit on an antitrust claim and yet to hold at the same time that the statutes of limitation were tolled as to that claim. Respondent's contention is wholly contrary to the basic purpose of the California tolling statute—namely, to prevent the running of the California statute of limitations against a plaintiff who was unable to present his cause of action in California because defendant was not amenable to suit there. The California statute has consistently been construed in the light of that purpose. This may be seen not only from such cases as *Chappell* v. *Thompson*, 21 Cal. App. 136 (D. C. App. 2d Dist., 1913), *Schneider* v. *Schneider*, 82 Cal. App. 2d 860 (D. C. App., 2d Dist., 1947), *Loope* v. *Greyhound Lines*, 114 Cal. App. 2d 611 (D. C. App. 4th Dist., 1952), and *Taylor* v. *Navigazione Libera Triestina*, 95 F. 2d 907 (9th Cir., 1938). It plainly appears even in the cases relied upon by respondent in its opposing brief at page 11.

Thus, it is well settled that if the defendant could have been sued in California, a plaintiff is barred from maintaining the action if he does not bring it within the time specified by the statute—here three years. This principle was, in fact, applied in the case of *Lawrence* v. *Ballou*, 50 Cal. 258 (1875), the case relied upon so heavily by respondent here. In that case, plaintiff brought an action in ejectment against E. H. Parker

and others. Thereafter, on plaintiff's motion, the Hazard Powder Company, a Connecticut corporation, was added as a party defendant. At the trial, the Court found that the Powder Company had ejected plaintiff on September 13, 1865. The action was commenced against the Powder Company on April 19, 1871. The Powder Company pleaded the five-year statute of limitations. In holding that the Powder Company was entitled to the benefit of the statute, the Court said (page 264):

> "In the present case the corporation was made a party defendant, and the complaint alleges an entry and ouster by the company, and an adverse holding of the premises since the 2d of May, 1865, and the court below found as a fact that the ouster occurred more than five years before the company was made a party defendant. It cannot be claimed that the defendant was present and in the actual occupation for the purpose of being sued, but that the court must, at the same time, ignore its presence and occupation when they are relied upon as constituting an adverse possession and defense."

Indeed, the decisions go even further. If the plaintiff can sue the defendant on the particular cause of action asserted by him and the California courts have jurisdiction to dispose of the particular controversy between the parties, the statute of limitations will not be tolled as to that cause of action even if the defendant has never been amenable to suit generally. *Ridgway* v. *Salrin*, 41 Cal. App. 2d 50 (D. C. App., 3rd Dist., 1940) is directly in point. In that case plaintiff brought a proceeding to foreclose a mortgage on lands in California against Sarah S. Salrin, a resident of Ohio, who had never lived in California. The cause of action accrued on March 13, 1929, and the plaintiff brought his action on September 29, 1937. Defendant pleaded the statute of limitations and plaintiff relied upon Section 351. Judgment was entered for defendant on the ground that the statute of limitations had

run. In affirming the judgment below, the Court speaking of Section 351, said (pp. 54, 55):

> "The foregoing section was adopted for the benefit of creditors who possess causes of action, to preserve or extend their right of action as a matter of justice during the period following the accrual of the right of action during which the debtor or the party against whom the cause exists, is absent from the state of California so that the right of action may not be lost on that account. *It follows that if the right of action is not barred or suspended by the absence of the person against whom it prevails, the running of the statute of limitations will not be thereby tolled.*
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> "This is a suit to foreclose a mortgage lien against land in California which was conveyed by the mortgagor and owner of the land to her sister in the state of Ohio after the mortgage was executed and recorded. The grantee took title to the land subject to the mortgage, but she did not assume the obligation of the mortgage nor did she become liable for the payment of the debt for which it was executed. Since, without personal service upon the absent grantee, a deficiency judgment could not be rendered against her in California, *complete jurisdiction of the court over the land for the purpose of foreclosing the mortgage lien, was acquired by publication of the summons in spite of her absence from the state. We therefore conclude that under the circumstances of this case, the provisions of section 351 of the Code of Civil Procedure has no application, and the time for commencing this action was not tolled by the absence of the grantee.* The trial court therefore properly concluded that the suit was barred by the statute of limitations." (Emphasis added.)

See also *Mangene* v. *Diamond*, 132 F. Supp. 27 (E. D. Pa. 1955) affirmed 229 F. 2d 554 (3rd Cir., 1956)

These cases make it very clear that even if, as respondent now contends, we must look to California law to de-

termine the test to be used in applying the California tolling statute to a claim under the antitrust laws, the California courts likewise would hold that if defendant was amenable to suit under the antitrust laws during the relevant three-year period, plaintiff's antitrust claims are barred. In short, the test which the California courts would apply is the very test of jurisdiction and venue which the trial court and the court below actually held controlling.

CONCLUSION

As we have demonstrated in this brief, the proper test to be applied in determining whether the California statute has run in this case is the test of jurisdiction and venue under the antitrust laws. These tests, we submit, have been applied in contested factual situations by judges without juries from time immemorial. The decision of the court below that these issues must now be submitted to a jury constitutes such a departure from prior law as to justify review by this Court.

Respectfully submitted,

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